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School Desegregation

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SCHOOL DESEGREGATION

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I. STATICS AND STATISTICS

The South has many faces, and as many attitudes toward school desegregation. In the heart of Dixie a federal district court judge calls the Supreme Court's decision in the *School Segregation Cases*,[1] "one of the truly regrettable decisions of all times."[2] But further south by the compass, a school board in Dade County, Florida adopts nondiscriminatory school personnel practices, stating "we do not believe we can teach democracy in our schools without demonstrating our belief in democracy in the way the schools are operated."[3] In 1963, a board of education in Oklahoma City, Oklahoma, is discovered practicing discrimination, southern style.[4] And Prince Edward County, Virginia, begins its fifth September without public schools.[5]

In short, any discussion of southern school desegregation must be self-defining. What distinguishes segregation southern style from segregation in other parts of the country? It is not a geographical distinction, anymore than Baltimore and Cambridge, Maryland, can be linked together as southern or northern in temperament. Painted with a broadbrush, southern school segregation is segregation motivated by racial factors, whereas school segregation in the North and West is resulting from the use of geographical school attendance areas in Negro ghettoes. More simply, the South keeps its Negroes out of the neighborhood schools, and the North keeps its Negroes in the neighborhood schools. Both practices result in educational apartheid.[6]

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[1] Brown v. Board of Educ., 347 U.S. 483 (1954).

[2] Davis v. East Baton Rouge Parish School Bd., 214 F. Supp. 624, 625 (E.D. La. 1963).

[3] Miami Herald, June 6, 1963, § C, p. 3.

[4] Dowell v. School Bd., 219 F. Supp. 427 (W.D. Okla. 1963).

[5] The Prince Edward County case, one of the original school desegregation cases, is still in litigation. The latest decision, by the Fourth Circuit Court of Appeals, put off a final decision to still another day. The court decided to await a Virginia state court decision interpreting the constitutionality of the closing of public schools in the county. Griffen v. Board of Supervisors, 32 U.S.L. WEEK 2101 (4th Cir. Aug. 12, 1963).

[6] These practices are by no means the only practices which foster mono-

The Supreme Court has held school assignment practices *based on race which result in segregation* unconstitutional.[7] The Court did this on May 17, 1954. On May 17, 1963, the ninth anniversary of that decision, no Negro child attended public school with white children in the states of Mississippi, Alabama, and South Carolina.[8] In Georgia, only 44 Negro pupils attended formerly all white schools.[9] Louisiana, North Carolina, and Arkansas had placed less than 1000 of their Negro scholastics in desegregated schools.[10] Indeed, nearly a decade had passed and none of the former Confederate States[11] had desegregated more than 3 per cent of their Negro school population. The border states[12] and the District of Columbia had moved considerably further.[13] But nevertheless, the close of the 1962-1963 school year found less than 8 per cent of the Negro school population in desegregated schools in the 17 southern and border states and the District of Columbia.[14]

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racial groupings. One study revealed that Negro students, because of their more culturally deprived environs, tended to gravitate to the lower achieving groups or tracts. See U.S. COMM'N ON CIVIL RIGHTS, STAFF REPORT, CIVIL RIGHTS U.S.A.: PUBLIC SCHOOLS SOUTHERN STATES 1962, at 37 (1962) [hereinafter cited as SOUTHERN STATES]; *cf.* Stell v. Savannah-Chatham County Bd. of Educ., 8 RACE REL. L. REP. 514 (S.D. Ga. June 28, 1963), *injunction granted pending appeal,* 318 F.2d 425 (5th Cir. 1963).

[7] The Court has yet to rule on: (1) School assignments based on race which result in desegregation. For example, the school board of Teaneck, New Jersey, allows transfers in or out of a predominantly Negro elementary school only if the transfers promote racial balance in the school. Minutes of Teaneck Board of Education meeting of May 8, 1963. (2) School assignments not based on race which result in segregation. For example, most northern school assignment practices are based on the neighborhood school theory. Consequently, when Negro children in a Negro residential area are required to attend a school located in that area, the school becomes virtually all-Negro. A federal court has ruled that this so-called *de facto* segregation is not unconstitutional. Bell v. School City of Gary, 213 F. Supp. 819 (N.D. Ind. 1963).

[8] Southern School News, June, 1963, p. 1, cols. 1-3.

[9] *Ibid.* Atlanta was the only city desegregated. As regards whether the Atlanta desegregation process can be expected to quicken, see Calhoun v. Latimer, 8 RACE REL. L. REP. 502 (5th Cir. June 17, 1963).

[10] Southern School News, June, 1963, p. 1, cols. 1-3.

[11] Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

[12] Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia.

[13] Oklahoma has the lowest percentage of Negroes attending school with white children, 23.6 per cent. Southern School News, June, 1963, p. 1, cols. 1-3. However, this is 20 plus per cent higher than the closest southern state, Texas. *Ibid.*

[14] *Ibid.*

II. The Status Quo in Formaldehyde

Before the *Brown* decision southern children were assigned to schools according to race and residence. Large cities in the South used two school attendance zone maps—one map distributed white children among the white schools and the second map distributed the Negro school population among the Negro schools. Often the white and Negro schools adjoined one another. In the smaller communities, one consolidated school served all the Negro children and one consolidated school served all the white children. Consequently dual attendance area maps were unnecessary.

The *Brown* decision signaled the end of *express* segregative practices in southern schools. Although between 1954 and 1957 official segregation enjoyed an indian summer characterized by massive resistance legislation, the unwelcome, but unmistakable, handwriting was on the wall. Official policies could no longer expressly consider race a factor in pupil assignment. The issue was clear; southern legislatures had to retain segregated schools, but at the same time purge their school laws of any mention of race. As a solution the legislatures came up with the pupil assignment laws.

The pupil assignment acts, adopted by all the former Confederate States,[15] provide that each child individually shall be assigned to a specific school. Either state or local officials are given the power of assignment, and they are charged with the duty to consider a number of criteria in assigning a pupil, including available school buildings, faculties, and transportation; the academic training and abilities of the child as suited to a particular school; the child's personal characteristics, health, morals, and home environment; and the effect the admission of the particular pupil would have on other pupils in a specific school and the community.[16] If parents object to the assignment of their child, they must follow an intricate scheme of hearings and appeals, with no guarantee that the assignment will be changed.[17] Similarly, if a child wants to transfer from one school

[15] 2 U.S. Comm'n on Civil Rights, Report, Education 1961, at 22 (1961).

[16] The Supreme Court held that at least one of these criteria is a valid school assignment measure. However, it did not hold that all are valid. Shuttlesworth v. Birmingham Bd. of Educ., 358 U.S. 101 (1958).

[17] For a run-around that would make Quintus Fabius Maximus look like an amateur, see Jeffers v. Whitley, 309 F.2d 621 (4th Cir. 1962).

to another, he and his parents must pursue still another set of procedures.[18]

Behind the facade of the pupil assignment acts, southern school systems continued to assign Negroes to traditionally Negro schools and white children to traditionally white schools. In fact, few communities made any pretense at good faith administration of the new school assignment laws.

As would be expected, the assignment acts were soon in the federal courts. In *Carson v. Warlick*,[19] the first significant decision, the Fourth Circuit Court of Appeals handed the proponents of the placement laws exactly what they had hoped for. The court held that Negro parents objecting to school assignments could not sue without first following the labyrinthine rehearing and appeal structures provided in the pupil assignment laws. Moreover the court held that the individual plaintiffs could not sue to desegregate the whole school system. They could secure only their own admission. This, in effect, meant that *every* Negro school child discriminated against by the same school system had to individually: (1) wade through a morass of administrative red tape to "exhaust his state remedies"; and (2) then bring suit only for himself.[20]

Several years elapsed before the pupil assignment laws were again before a federal court of appeals; and it was then that the whittling at *Carson v. Warlick* began. In October, 1959, the Eighth Circuit Court of Appeals (although expressly approving *Carson*)

[18] An artful use of the transfer provisions of the Virginia pupil placement act is described by Professor Mearns of the University of Virginia as follows:

"Negroes seeking admission (transfer) to the lowest elementary grade of white schools face another obstacle. The State cutoff date, after which requests for transfer will not be considered, falls prior to the date of preregistration which is set by the local [Richmond] officials. Unless a Negro parent is particularly foresighted, he will not have thought to apply for transfer before his child's enrollment in school. The result is that most Negro children begin their education in a Negro school. Therefore, the first real opportunity for a Negro child to apply for admission to a white school comes toward the end of his first school year. But once a pupil is settled in a school, inertia cuts down his desire to transfer. Thus, the time sequence on transfer reduces the number of Negroes who seek to attend desegregated schools in Richmond." SOUTHERN STATES 187.

[19] 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

[20] Actually all parties who had exhausted their administrative remedies could join together as a class in a single suit, but they still could not represent the children who had not exhausted their state administrative remedies. See Covington v. Edwards, 264 F.2d 780 (4th Cir.), *cert. denied*, 361 U.S. 840 (1959).

did not dismiss the suit of Negro plaintiffs who had failed to exhaust their administrative remedies under the Arkansas Pupil Placement Act.[21] The very next month the Fifth Circuit Court of Appeals flatly rejected the Florida Pupil Placement Act.[22] Two years later, in March, 1962, the Sixth Circuit Court of Appeals held the Tennessee Pupil Placement Act as used by Memphis school authorities unconstitutional.[23]

By June, 1962 it was clear that the Fourth Circuit Court of Appeals felt the backwash of the criticisms of *Carson v. Warlick*. For at that time the court began the tortuous backdown from its 1956 decision. In five cases,[24] decided between May and December, 1962, the court was able to bring itself in line with the other federal courts in the South. As 1963 opened, the federal courts presented a solid front against the southern pupil placement acts.[25] Negro plaintiffs could ignore the administrative red tape of school transfer regulations, and go immediately to the federal courts. Moreover, one plaintiff could represent all of the Negro children in a school system, saving each of them the trouble and expense of suit.

III. From the Courts to the Schools

Current desegregation doctrine assures segregated Negro children in the South an easy entrance into the federal courts. In this sense, half the battle has been carried. In another sense the battle has just begun, for it is still a long step from the court house to the school house in contemporary desegregation dogma.

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[21] Parham v. Dove, 271 F.2d 132 (8th Cir. 1959).

[22] Gibson v. Board of Pub. Instruction, 272 F.2d 763 (5th Cir. 1959).

[23] Northcross v. Board of Educ., 302 F.2d 818 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962).

[24] Wheeler v. Durham City Bd. of Educ., 309 F.2d 630 (4th Cir. 1962); Jeffers v. Whitley, 309 F.2d 621 (4th Cir. 1962); Dillard v. School Bd., 308 F.2d 920 (4th Cir. 1962); Marsh v. County School Bd., 305 F.2d 94 (4th Cir. 1962); Green v. School Bd., 304 F.2d 118 (4th Cir. 1962).

[25] There still remained some mopping up exercises over the federal district courts. Even as late as 1963 a few lower courts were still insisting that the pupil placement laws were proper desegregative vehicles.

In Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425 (5th Cir. 1963), the Fifth Circuit Court of Appeals framed its own desegregation order for a lower court which had held that the Supreme Court was wrong in 1954 and that school segregation was constitutional. See also Armstrong v. Board of Educ., 8 Race Rel. L. Rep. 465 (5th Cir. July 12, 1963). *But see* Corbin v. County School Bd., Civil No. 2737, E.D. Va., May 16, 1963; Evers v. Jackson, Civil No. —, S.D. Miss., June 25, 1963; Hudson v. Leake County School Bd., Civil No. —, S.D. Miss., June 25, 1963.

The role of the federal courts in the school desegregation process was broadly defined by the Supreme Court in 1955.[26] In general, the courts were to require local school authorities to make a prompt and reasonable start toward desegregation. After a start had been made, the federal courts could allow school authorities additional time to solve the various administrative problems involved in the transition to a racially nondiscriminatory school system. Guided only by this blurred blueprint, the federal courts set about the work of reorganizing the school structures and policies of a third of the United States. After several years of trial and error, the courts arrived at an acceptable time schedule. It was a twelve year stairstep process, with the desegregation of one grade-per-year throughout the school system.[27]

The grade-a-year time schedule held up as an acceptable desegregation pace until 1961.[28] Then the courts took a closer look at still-segregated school systems. Several facts forced this reexamination: (1) six years had passed since the *Brown* decision; (2) most southern school systems had made no pretension of initiating desegregation; and (3) even when brought to court, school authorities often remained intransigent.[29] The question was then

[26] Brown v. Board of Educ., 349 U.S. 294 (1955).

[27] Calhoun v. Latimer, 188 F. Supp. 412 (N.D. Ga. 1960); Calhoun v. Members of Bd. of Educ., 188 F. Supp. 401 (N.D. Ga. 1959); Kelley v. Board of Educ., 270 F.2d 209 (6th Cir.), *cert. denied,* 361 U.S. 924 (1959).

If a grade-a-year plan started at grade twelve and worked down, it would allow every Negro child in the system an opportunity, albeit limited, for some desegregated education. On the other hand, if a grade-a-year plan started with the first grade, no Negro child in grades two through twelve would ever experience a desegregated education. For articulate indifference to the latter phenomenon try:

"Some individuals, parties to this case, will not themselves benefit from the transition. At a turning point in history some, by the accidents of fate, move on to the new order. Others, by the same fate, may not. If the transition is made successfully, these plaintiffs will have had a part. Moses saw the land of Judah from Mount Pisgah, though he himself was never to set foot there." Goss v. Board of Educ., 186 F. Supp. 559, 569 (E.D. Tenn. 1960), *aff'd,* 301 F.2d 164 (6th Cir. 1962), *rev'd on other grounds,* 373 U.S. 683 (1963).

[28] As late as 1962, federal courts in Texas were accepting a grade-a-year plan if the Negro plaintiffs did not object. Eastland v. Northeast Houston Independent School Dist., Civil No. 13,330, S.D. Tex., Oct. 23, 1962; Washington A. & M. Independent Consol. School Dist., Civil No. 13,816, S.D. Tex., Aug. 17, 1962. As regards the changing judicial attitude in 1963, see Liase v. Longview Independent School Dist., Civil No. —, E.D. Tex., June 27, 1963.

[29] Goss v. Board of Educ., 301 F.2d 164 (6th Cir. 1962), *rev'd on other grounds,* 373 U.S. 683 (1963).

clearly presented: Should federal courts continue to extend a twelve year desegregation tolerance to school authorities who for six years had refused to recognize the rights of their Negro children? The answer was no.[30] The equities had shifted,[31] and the federal judges began to shorten the time schedules of desegregation.[32]

Twelve-year desegregation plans now belong to desegregation's history. September, 1963, saw grade-a-year plans begin in only a few Deep South communities.[33] In systems outside the Deep South grade-a-year plans are no longer appropriate,[34] and in the border states, federal judges tolerate nothing except immediate, systemwide desegregation.[35]

IV. From How Long to How

In the formative years of desegregation doctrine the battle lines were drawn around the issue of how long a school district could postpone desegregation. This issue is quickly receding to the background of desegregation litigation. The prime issue today is: What

[30] Jackson v. School Board, Civil No. 8722, 4th Cir., June 29, 1963; Bush v. Orleans Parish School Bd., 308 F.2d 491 (5th Cir. 1962); Goss v. Board of Educ., *supra* note 29. The Court of Appeals for the Third Circuit, in considering the Delaware desegregation process, had deemed twelve years too long as early as 1960. Evans v. Ennis, 281 F.2d 385 (3d Cir.), *application for stay denied*, 364 U.S. 802 (1960), *cert. denied*, 364 U.S. 933 (1961).

[31] In the Supreme Court's original instructions to the district courts in 1955, the Court stressed the equitable nature of the balanced interests stating: "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." Brown v. Board of Educ., 349 U.S. 294, 300 (1955).

[32] The Supreme Court, in dictum, endorsed the acceleration of school desegregation:

"Given the extended time which has elapsed, it is far from clear that the mandate of the second Brown decision requiring that desegregation proceed with 'all deliberate speed' would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. Brown never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools . . . ." Watson v. City of Memphis, 373 U.S. 526, 530 (1963).

[33] *E.g.*, Armstrong v. Board of Educ., 8 Race Rel. L. Rep. 465 (5th Cir., July 12, 1963); Davis v. Board of School Comm'rs, 318 F.2d 63 (5th Cir. 1963); Stell v. Savannah-Chatham County Bd. of Educ., 318 F.2d 425 (5th Cir. 1963).

[34] Cases cited note 30 *supra*.

[35] *E.g.*, Dowell v. School Bd., 219 F. Supp. 427 (W.D. Okla. 1963); Walker v. Richmond, Ky., Bd. of Educ., Civil No. 241, E.D. Ky., June 14, 1963; Davis v. Board of Educ., 216 F. Supp. 295 (E.D. Mo. 1963).

does desegregation mean? Does it simply mean purging formal and informal school policies of any mention of race?[36] Does it mean that all Negro children must be placed in schools with white children?[37] Or does it mean that all Negro children must have an opportunity (whether or not exercised) to attend school with white children?[38] Does it mean that all vestiges of the pre-*Brown* system of segregation, *e.g.*, schools built in the center of the Negro communities, and staffed with all Negro faculties, must be abandoned? The Supreme Court has yet to answer these questions.[39] Moreover, many federal judges in the South have not had to face the issue of what is desegregation in the constitutional sense. This is owing to the fact that southern systems were operated on totally white and black bases. Consequently, any desegregation schemes suggested by southern school officials were almost certain to result in some school integration, a step in the constitutional direction. Again, because in the late 1950's the time quotient for full compliance was usually twelve years, the courts could justifiably postpone the issue of full compliance for at least a decade.

Conversely, although federal courts in the South have yet to define what is desegregation in the constitutional sense, these courts have supplied some guide-lines on the problem.[40] These guide-lines inhere in the changing judicial attitudes towards current desegregation plans and policies. Almost a decade of trial-and-error with the difficulties of school integration has given federal courts experiences and perspectives of the desegregation process they lacked in the beginning. These experiences and perspectives are reflected in the

[36] Goss v. Board of Educ., 373 U.S. 683 (1963) held that classifications based on race for purposes of transfers between public schools violated the equal protection clause of the fourteenth amendment.

[37] In Briggs v. Elliot, 132 F. Supp. 776 (E.D.S.C.), *enforcing sub. nom.*, Brown v. Board of Educ., 349 U.S. 294 (1955), the court stated: "Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination." *Id.* at 777.

[38] This is the nature of the decree in Taylor v. Board of Educ., 195 F. Supp. 231 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961).

[39] The Court in Watson v. City of Memphis, 373 U.S. 526 (1963), expressed an increasing disapproval of the slow pace of desegregation, but did not comment on the issue of total desegregation.

[40] In the North this issue has been squarely faced in Bell v. School City of Gary, 213 F. Supp. 819 (N.D. Ind. 1963).

current judicial treatment of desegregation schemes as proposed by school authorities who are to begin integration of their systems.

There are two major types of desegregation plans: a free-choice-of-schools plan, and a geographical zoning plan.

A. The Free-Choice-of-Schools Plan; Urban Areas in the South

The free-choice-of-schools scheme of school integration was popularized by Baltimore, Maryland[41] and Louisville, Kentucky.[42] The plan simply allows any child in the system to choose any school he wishes to attend. A variant on the same concept is the Houston, Texas plan which allows any child in the system a choice of two specific schools in his neighborhood, the formerly all-Negro school or the formerly all-white school.[43] In smaller school systems which have adopted this plan, there are often only two schools, the traditional Negro school and the traditional white school.[44] In these systems also the free-choice-of-schools policy is limited to only two schools.

Do free-choice-of-schools plans actually integrate school systems? Conceptually, the plans allow every Negro child an opportunity to receive a biracial education.[45] But between the idea and the reality there falls the shadow.[46] In the large school systems of Louisville and Baltimore, Negro children living in large Negro residential areas must spend money and time to reach a biracial school; the systems do not furnish bus transportation.[47] Moreover, the Negro

[41] See CIVIL RIGHTS REPORT, *op. cit. supra* note 15, at 17-18.

[42] See CARMICHAEL & JAMES, THE LOUISVILLE STORY (1957).

[43] Ross v. Peterson, 5 RACE REL. L. REP. 709 (S.D. Tex. Aug. 12, 1960).

[44] Vick v. County Bd. of Educ., 205 F. Supp. 436 (W.D. Tenn. 1962).

[45] Except, of course, when the free-choice-of-schools is limited to one grade a year. The children in the still-to-be-desegregated grades must attend according to their race. *But see* Dove v. Parham, 7 RACE REL. L. REP. 1047 (E.D. Ark. Oct. 25, 1962).

[46]
Between the idea
And the reality
Between the motion
And the act
Falls the Shadow
For thine is the Kingdom
Between the conception
And the creation
Between the emotion
And the response
Falls the Shadow
Life is very long

ELLIOT, *The Hollow Men*, in COLLECTED POEMS 1909-1935, at 104 (1936).

[47] New York City assumes the costs of transportation of children seeking to escape schools with a minority group enrollment of 88% or more.

parents find it difficult to participate in social and educational programs in the biracial schools located far from their homes.[48]

On the other hand, rarely will a white child, or his parents, choose the pre-desegregation Negro school. No court can change the community's image of these schools to anything but the "colored schools," or "the Negro high school." Moreover, the names of many of the pre-*Brown* Negro high schools are easily identifiable as such. A white graduate of a school named Crispus Attucks, Rosenwald, or Booker T. Washington, is surely identifiable as a graduate of a Negro school in communities both North and South. Consequently, free-choice-of-school policies in the larger cities in the South,[49] or in Louisville[50] and Baltimore,[51] as cities with a southern exposure, have not brought about biracial school systems; but systems of all-white,[52] biracial, and all-Negro schools.

In large southern cities, a free-choice-of-schools-plan may or may not conform to the concept of full compliance to the *Brown* decisions. Whether it does in small southern communities is a totally different question, attended by quite different considerations.

B. The Free-Choice-of-Schools Plan; Rural Areas in the South

The Negro parent in small southern school districts is generally economically dependent upon the white business man or farmer. Moreover, he and his job are known by more people in the community than his city counterpart, who enjoys urban anonymity. Consequently, the easily identifiable Negro parent who enrolls his child in a white school in a rural school district risks economic, social, and other pressures not risked by his urban neighbors.[53] Even

[48] In St. Louis, when Negro children were bused to distant schools to relieve overcrowding in neighborhood schools, the parents were still considered part of the neighborhood school P.T.A. See U.S. COMM'N ON CIVIL RIGHTS, STAFF REPORT, CIVIL RIGHTS U.S.A.: PUBLIC SCHOOLS NORTH AND WEST 1962, at 270-74 (1962).

[49] See Calhoun v. Latimer, 8 RACE REL. L. REP. 502 (5th Cir. June 17, 1963), for the modified free choice plan in effect in Atlanta, Ga. In three years of operation the plan had succeeded in placing 53 of its 46,000 Negro school children in formerly all-white schools. When the plan was attacked as moving too slowly, the Fifth Circuit Court of Appeals upheld the plan as consonant with constitutional speed.

[50] SOUTHERN STATES 26-38.

[51] See CIVIL RIGHTS REPORT, *op. cit. supra* note 15, at 17.

[52] See authorities cited notes 50-51 *supra*.

[53] In some instances the local newspapers will publish information on Negro transfer applicants, including the names and addresses of the Negro parents, and their place of employment. So much for free speech and the fourth estate.

if these threats do not in fact materialize, many a Negro parent will not want to take the chance that they will.[54]

One court, when considering a proposed free-choice plan, recognized that the Negro parents in the school district occupied an economically subservient position in the community.[55] Nevertheless the court approved the plan with the following qualification.

> In the event that, upon the registration of the Negro students in June, it should appear that economic or other pressure, overtly, or covertly, is brought to bear on the Negro parents and students, this Court, having retained jurisdiction, might find it necessary to eliminate the choice provision from the plan in order to effectuate the mandate of the Supreme Court in the Brown decisions.[56]

Should the risk of economic coercion be borne, even temporarily, by Negro parents?[57] Assuming it should, who has the burden of

[54] In the Powhatan, Virginia, desegregation case when suit was about to be filed:

"[D]iscouraging rumors were spread in the Negro community raising fears that by pressing for their altogether valid rights they [Negro parents] would bring about a shutdown in the county schools. Repeatedly cited as a warning example was the experience of adjacent Prince Edward County where the School Board closed the public schools four years ago and kept them closed rather than abandon the segregated system. If the record fails to establish that the school officials themselves do not actively propagate such fears, it plainly shows that they said and did nothing to allay the apprehensions which pervaded their community." Bell v. School Bd., Civil No. 8944, 4th Cir., June 29, 1963.

[55] Vick v. County School Bd., 205 F. Supp. 436 (W.D. Tenn. 1962).

[56] *Id.* at 440. Compare Kelley v. Board of Educ., 270 F.2d 209, 229 (6th Cir. 1959), stating:

"If the child is free to attend an integrated school, and his parents voluntarily choose a school where only one race attends, he is not being deprived of his constitutional rights. It is conceivable that the parent may have made the choice from a variety of reasons—concern that his child might otherwise not be treated in a kindly way; personal fear of some kind of economic reprisal; or a feeling that the child's life will be more harmonious with members of his own race. In common justice, the choice should be a free choice, uninfluenced by fear of misery, physical or economic, or by anxieties on the part of a child or his parents."

In the Knoxville desegregation scheme, Negro students wanting to transfer to all-white schools for special training had to receive the approval of both the sending and the receiving school. The Sixth Circuit Court of Appeals held that, on their face, these provisions offered "too much opportunity for a transfer to be stopped." Goss v. Board of Educ., 305 F.2d 523, 526 (6th Cir. 1962).

[57] While the Birmingham, Ala., desegregation suit was pending, the superintendent of schools raised the school band and school material fees in the Negro schools to a par with those of the white schools. In the past the school system had recognized that Negro parents as a class were more

proving the existence of economic coercion in a subsequent court proceeding?[58] And, pragmatically, how many "economically subservient" Negro parents will be willing to testify to covert economic pressure? If the economic threat could prevent them from enrolling their children in white schools in the first place, doesn't it also prevent them from testifying to this fact?

The power structure within the rural Negro community does not encourage desegregation. Often Negro political leaders receive sinecures related to, and dependent upon, the operation of the Negro schools. Indeed, a survey of rural desegregation in Delaware reported one Negro leader as being the school bus driver, janitor, and the landlord of the two school teachers. Again, mass transfers of Negro students to white schools would indicate a loss of influence and control by the Negro power structure which is attuned to the wishes of the white establishment, threatening the continued sufferance of white politicians to Negro incumbents. At any rate it would appear that leaders in the rural Negro communities, on balance, would prefer the dual system of schools, one for Negroes and one for whites.

With few exceptions[59] Negro teachers in rural areas actively discourage integration, or are non-committal. The reason is simple. Integration will probably mean their jobs. In a free-choice-of-schools plan these teachers may be expected to encourage Negro children to "stay with their own kind." If a substantial number of Negro children chose to attend the white schools, the white schools would be integrated. The reason for the Negro school, apartheid, would be frustrated. Consequently, continued operation of the Negro school would fall to economic considerations, viz., would the closing of the Negro school and the transfer of the students to the white schools save the system a large amount of money? The answer is yes for most systems.[60] Duplicate physical facilities and

economically deprived than white parents in Birmingham. The superintendent commented: "I'm striving to equalize everything, in all aspects, that I can." Birmingham News, Aug. 20, 1962, p. 23.

[58] *Compare* Calhoun v. Latimer, 8 RACE REL. L. REP. 502 (5th Cir. June 17, 1963), *with* Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962).

[59] In Delaware, one Negro school principal offered a money incentive to the parents of a promising Negro child contingent upon his transfer to an all-white school. The child was not transferred. Wilmington Morning News, January 2, 1963, p. 1.

[60] In Fairfax County, Virginia, the estimated utilization of the Negro schools was only 74% in the 1962-1963 school year, owing to desegregation and population changes. Washington Post, March 31, 1963, § B, p. 1.

bus routes are expensive.[61] In systems where the white schools cannot absorb all of the Negro children the Negro schools remain open but the vacancies created by transfers to white schools result at least in the dismissal of some teachers.[62]

Negro teachers in urban areas are not under these pressures to encourage the status quo segregation. Negro school age populations are burgeoning in urban areas, and as the ghettos form and expand the need for Negro teachers expands.[63] Moreover, the placement of Negro teachers on white faculties, to the extent it has occurred in the South, has occurred in urban centers.[64] Consequently urban Negro teachers do not feel the economic urgency to discourage integration that is felt by their rural colleagues.

C. School Assignment by Geographical Attendance Zones

The alternative to allowing all students a free-choice-of-schools is to assign each student to a particular school. However, as previously discussed,[65] the pupil placement acts of the various southern states are not acceptable assignment vehicles, at least for desegregation.[66] But another criterion for pupil assignment has been judicially

Dade County, Florida, on its own motion, placed over 300 Negro students in formerly all-white schools nearest their homes to avoid the cost of busing them to all-Negro schools. Four school buses were retired from use. Miami Herald, Nov. 22, 1962, § C, p. 1.

[61] See note 60 *supra.*

[62] See SOUTHERN STATES 46-48.

[63] Examples of the effect of the expansion of Negro ghettos on formerly all-white schools may be found in Charlotte, N. C., and Broward County, Fla. The formerly all-white schools are first integrated, and then, as the population shifts, they become all-Negro, and the all-white faculties are replaced by all-Negro faculties (hastening the exit of the remaining white enrollment). SOUTHERN STATES 89; St. Petersburg (Fla.) Times, Nov. 14, 1962, § A, p. 14.

[64] The Oklahoma State Advisory Committee to the U.S. Commission on Civil Rights reported in June, 1963, that: "[E]mployment opportunities for Negro educators since 1954 have increased and decreased simultaneously. In the districts which have not desegregated, employment of Negroes has been constant; in districts where desegregation has been total, opportunities for Negroes have almost disappeared; in the larger mixed districts, employment of Negro personnel has increased sharply in the period since 1954. OKLAHOMA ADVISORY COMM. ON CIVIL RIGHTS, REPORT ON THE EXTENT AND PATTERN OF SEGREGATION IN OKLAHOMA'S PUBLIC SCHOOLS (1963).

[65] See notes 21-25 *supra* and accompanying text.

[66] "The Court cannot approve the Tennessee Pupil Placement Law as a plan for accomplishing desegregation of the schools. This law, as shown on its face, is not a plan for desegregation nor is desegregation a part of its subject matter or purpose." Sloan v. Tenth School Dist., 6 RACE REL. L. REP. 999, 1000 (M.D. Tenn. Nov. 22, 1961).

approved as a means to desegregate schools. It is the geographical attendance zone theory.[67]

Most simply, all the schools in the system are assigned attendance zones which include residential areas nearest to the schools. In cities, this system of assignment is called the neighborhood school policy. In urban areas, owing to population densities, an elementary school may be constructed to serve all the children within walking distance, viz., in the neighborhood.

The same is true on the secondary level. The city will be divided into districts, and, although they will be much larger than the elementary school districts, secondary school children will be assigned to the school nearest their homes.[68] In effect the neighborhood school policy is applied to larger neighborhoods.

At first blush the neighborhood school policy appears to be the best possible solution to the desegregation issue in southern cities. It eliminates all reference to race in school assignment. It promotes the safety of children (more so than the free-choice-of-schools plan, which allows children to travel any place in the city). White children in the attendance zones of the former Negro schools cannot run away[69] and, on the other hand, Negro children are locked into

"This Court . . . condemns the Pupil Placement Act when, with a fanfare of trumpets, it is hailed as the instrument for carrying out a desegregation plan while all the time the entire public knows that in fact it is being used to maintain segregation by allowing a little token desegregation." Bush v. Orleans Parish School Bd., 308 F.2d 491, 499 (5th Cir. 1962).

[67] The concept of a school attendance zone is really only a concept. When a child may choose to attend one of two schools (as in the Houston plan, notes 43-44 *supra* and accompanying text) his "zone" is really the two schools. Again, in the court approved desegregation plan for Transylvania County, North Carolina, Negro children were permitted to choose to attend the white schools in the county, or bus to an all-Negro school in the next county (where they had always been sent). Conley v. Transylvania County School Bd. of Educ., Civil No. 2094, W.D.N.C., March 28, 1962. By such a plan the school "zone" for Negro students extended over two counties, for white students it spanned only one county. A denial of equal protection of the laws to white students?

[68] An exception to this grouping would be the special trade schools, or schools enrolling the very talented academics. These schools generally enroll students from anywhere in the city.

[69] Southern school districts which adopted the geographical attendance zone scheme to desegregate did have a safety valve for this situation. It was the minority transfer rule, allowing any child whose race is in a minority in a school to transfer out of the school. The Supreme Court in Goss v. Board of Educ., 373 U.S. 683 (1963) declared this provision unconstitutional. School authorities then proceeded to adopt an open transfer clause, allowing any child to transfer anywhere where classroom space is available. See Memphis Commercial Appeal, June 15, 1963, p. 17.

formerly all white schools.[70]

Several factors counter the desegregation advantages of the neighborhood school policy. The plan does lock Negro children living in the ghettos of southern cities into Negro schools.[71] Moreover, as the population increases in the ghetto, new schools will be placed there, proliferating the Negro neighborhood schools.[72]

Another question is whether the dual system of segregation can be converted into a unitary system of geographical attendance zones. Often the traditional Negro schools and white schools are next door to each other. Regularly shaped attendance zone lines could not be drawn around these schools. At best two half circles could be drawn, with the flat sides of the half circles running parallel between the schools.[73]

As an alternative (on the elementary level) the so-called Princeton plan[74] may be used. This plan would use one large attendance area (a circle instead of the two half circles) to assign pupils in grades one through three to one of the adjacent schools. The same attendance area would be used to assign pupils in grades four through six to the other school.

The Princeton plan cannot be used as easily on the secondary level if the traditionally all white and the traditionally all Negro high schools (grades 7-12) adjoin one another. The special facilities and equipment indigenous to grades 7-9 and 10-12 must be moved into the school serving those grades, in many cases a very costly transition.

A plan which would bring about the optimum desegregation in a city saddled with the skeleton of the dual school system would be

[70] The Sixth Circuit Court of Appeals, which had held the minority transfer rule constitutional, did so out of concern for the isolated Negro child assigned to an overwhelmingly white school. Kelley v. Board of Educ., 270 F.2d 209 (6th Cir. 1959).

[71] Residential patterns in southern cities are not as uniracial as those in northern urban areas, owing to the traditional roles of Negroes as servants. Negroes lived in carriage-houses and their likes, behind the "big house." Through the years many Negro families inherited or purchased their ancestors' quarters and land amid, but not a part of, the white residential areas.

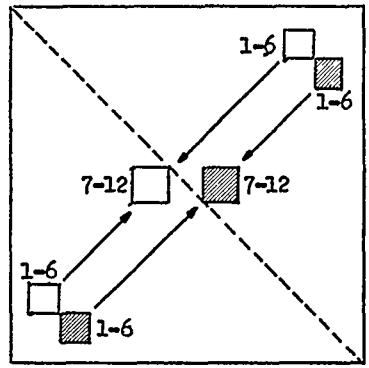
[72] See SOUTHERN STATES 183-84. *But see* Kreger v. Board of Trustees, 368 S.W.2d 873 (Tex. Civ. App. 1963).

[73] As regards who has the burden of proving an absence of gerrymander in the formulation of school attendance area zones, *compare* Dowell v. School Bd., 219 F. Supp. 427 (W.D. Okla. 1963), *with* Bush v. Orleans Parish School Bd., Civil No. 3630, E.D. La., May 17, 1963.

[74] So called because of its early use in Princeton, N.J.

to employ a Princeton plan in its elementary schools, and then use a feeder system whereby each elementary school feeds a certain high school. In a system with two pairs of elementary schools and one pair of high schools (figure a.), each year each high school would receive the combined sixth grade enrollment of one formerly all-Negro, and one formerly all-white, elementary school (figure b.). Assuming stable residential patterns the system would be desegregated in six years.

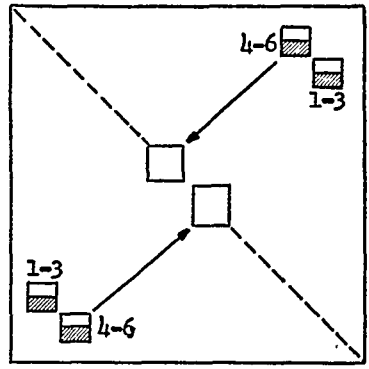
Figure A



Negro School Population

White School Population

Figure B



As regards rural school systems, school assignment by geographical attendance areas is more a concept than a reality. Proximity to school in rural areas is a matter of road conditions, and not mere distance. Moreover, residential patterns in rural areas are as racially heterogeneous as any place in the country. Consequently, desegregation here is simply a matter of revising existing school bus policies.

If school buses were required to pick up the first thirty odd children on their route, most rural schools would be desegregated.

V. Teacher Desegregation

Pupil desegregation in the South has moved with glacial speed.[75] Teacher integration has not moved at all.[76]

The Negro school teacher teaches solely in the Negro school in the South for many reasons, not the least of which are personal. A product of a life of southern apartheid, the Negro teacher, in the main, does not want to leave the comfort and associations of the Negro school. He does not want to trade it for the isolation and other stresses which would arise if he were to take a post in a white school. Evangelical drive is hard to muster when your job is at stake.[77]

Negro teachers do not try to secure their rights by court action in the South. Rather, teacher desegregation has been made a part of the demands of Negro students for an education purged of discrimination. Their argument runs as follows: (1) Negro students have a constitutional right to a racially uninfluenced education; (2) if teachers are assigned schools and classrooms on a racial basis, all students in the school system have their education processes affected by racial considerations; (3) therefore, racially based teacher assignment practices affect the constitutional rights of the *students,* over and above the affects on the constitutional rights of the teachers.

How have the federal courts treated the issue of teacher desegregation? In a phrase, they haven't. The Federal courts have refused to face the problem until the "desegregation of pupils has either been accomplished or has made substantial progress."[78] In

[75] By August 1, 1963, nine southern states (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Virginia) had placed less than 1% of their Negro students with white children. U.S. Comm'n on Civil Rights, Report, Civil Rights '63, at 65 (1963).

[76] By August 1, 1963, no Negro teacher taught on the same faculty with white teachers. The Chattanooga school system, as a defense to a teacher discrimination complaint, introduced evidence that a Negro teacher was teaching by television in the white schools. The court did not consider this important. Mapp v. Board of Educ., 319 F.2d 571 (6th Cir. 1963).

[77] Several Kentucky school districts, when faced with a desegregation threat, simply closed the Negro school, fired the Negro teachers, and absorbed the Negro children in the existing white schools. Since then the Kentucky Attorney General has held the school tenure laws applicable to Negro teachers, thus, at least officially, condemning the practice. 62 Ops. Ky. Att'y Gen. 855 (1962).

[78] Augustus v. Board of Pub. Instruction, 306 F.2d 862, 869 (5th Cir.

the few instances where the courts have decided the issue, the decision has been in the favor of the Negro students.[79] In probably the nicest distinction in desegregation dogma, the Sixth Circuit Court of Appeals held that Negro children could complain of the racial discrimination practiced against teachers and principals. On the other hand they could *not* complain of racial discrimination practiced by the school board against maintenance personnel, central administrative personnel, and other personnel who were not a daily part of the education processes directly affecting the Negro students.[80]

Assuming that the desegregation of teachers and pupils cannot be carried on at the same time, the courts are probably correct in giving precedence to student desegregation. Certainly if the students are the plaintiffs in these suits, they should be afforded their principal relief first. On the other side of the coin, if a Negro teacher brought suit for himself, could the federal court subordinate his constitutional rights to those of another group, the Negro students?[81]

VI. Conclusion

In a local context, but with regional significance, Judge Bailey Brown hit the issue of southern school desegregation.

> The matter is now simple: Does Birmingham have a segregated system? If—and there is really no if—that is so, then the question is: What is being done to eradicate it? We have now made it plain by cases which are an affectation to cite that a *plan* of desegregation must be offered or the district court must fashion its own plan.

1962), followed with blithe literality in Bush v. Orleans Parish School Bd., Civil No. 3630, E.D. La., May 17, 1963.

[79] Two decisions in Florida enjoined school boards from assigning all school personnel on the basis of race. Braxton v. Board of Pub. Instruction, 7 Race Rel. L. Rep. 675 (S.D. Fla. Aug. 21, 1962); Tillman v. Board of Pub. Instruction, 7 Race Rel. L. Rep. 687 (S.D. Fla. Aug 21, 1962). The injunctions were suspended when the school authorities submitted gradual plans for pupil desegregation, with teacher desegregation left to future consideration. *But see* Walker v. Richmond, Ky., Bd. of Educ., Civil No. 241, E.D. Ky., June 14, 1963, where the court insisted that the school desegregation plan "provide that no teachers or other personnel of the public schools of Richmond, Kentucky, shall be employed, assigned, denied employment or denied assignment on the basis of race or color."

[80] Mapp v. Board of Educ., 319 F.2d 571 (6th Cir. 1963).

[81] Of course, in grade-a-year plans, some Negro students must wait eleven years to receive an education on a constitutionally valid level, and some Negro students never do, see note 27 *supra*.

> Here it is 1962. This is eight years after the warning to commence with deliberate speed. More than that, the case about to be heard to consider non-existent defenses will not take place until October. That means that for yet another year Birmingham has put off the "evil" day, for by the time the case is heard, argued, briefed and submitted the opening of the Fall term will have passed and it will be too late administratively to accommodate the school system to the constitution.[82]

As the issue becomes clearer, it also becomes clearer that the resources of Negro citizens, both personal and pecuniary, are being drained. Can Negro parents look to state and local officers, rather than themselves, to secure the constitutional rights of Negro school children? If they cannot, then states rights may perish by holding its breath.[83]

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[82] Nelson v. Grooms, 307 F.2d 76, 79 (5th Cir. 1962) (concurring opinion).

[83] "*Recommendation I.*—That the Congress enact legislation requiring every local school board which maintains any public school to which pupils are assigned, reassigned, or transferred on the basis of race, to adopt and publish within 90 days after the enactment of such legislation a plan for prompt compliance with the constitutional duty to provide nonsegregated public education for all school-age children within its jurisdiction. The Congress should authorize the Attorney General, in the event the board fails to adopt or to implement a plan, to institute legal action to require the adoption or implementation of such a plan or any such other plan the court finds more appropriate and consistent with the equal protection clause of the 14th amendment." CIVIL RIGHTS '63, *op. cit. supra* note 75, at 69.